HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No. 1486/2001
(Old No. 1459 of 1995)

Kush Kumar
S/o Sri Sandal Singh
R/o Village Kalandee
P.S. Sardhana
District Meerut .....Appellant

Versus

State of Uttaranchal .....Respondent

Sri Arvind Vashishth learned counsel for the appellant.
Sri A. Rab learned Addl. G.A.

Coram :- Hon'ble Irshad Hussain, J.
Hon'ble J. C. S. Rawat, J.

Dated :- 01st September, 2004

(Per :- Hon'ble Justice J. C. S. Rawat)

This is a criminal appeal under section 374 of the Code of Criminal Procedure (for short 'Code') against the judgment and order dated 8.9.1995 passed by the Ist Additional Sessions Judge, Haridwar convicting under sections 364/394/302 IPC and sentencing the appellant-Kush Kumar to undergo R.I. for life imprisonment in each count. However by the said judgment and order the other accused Sunil Kumar alias Bhura was not found guilty under sections 364/394/302 IPC and he was acquitted.

2. The brief facts giving rise to the present appeal are that on 30.1.1992 when Sandeep Sharma (PW10)- the agent of 'Sachin Travels' was sitting in the office of the 'Sachin Travels' Haridwar two persons one Rakesh Kumar and other who did not disclose his name came to 'Sachin Travels' to book the taxi from Haridwar to Meerut for two days from 30.1.1992 to 1.2.1992. Sandeep Sharma, the agent of 'Sachin Travels' Haridwar, booked the taxi @ Rs. 1000/- and they gave Rs. 500/- as advance to him. They further told him that they are known to the residents of the Rishikul University. However, they were not known to Sandeep Sharma (PW10) – the agent of the 'Sachin Travels'. Sandeep

Vikram Singh – driver. Sandeep Sharma (PW10) and the deceased-Vikram Singh (taxi driver) alongwith taxi reached at Rishikul gate as instructed by them and they inquired about so called Rakesh Kumar from the students of Rishikul University. They informed them that they are known to them. Whereupon they took the taxi and went to Meerut. When the taxi did not return by 31.1.1992 as per booking, Sandeep Sharma (PW10) lodged a gumshugi report (Ex.Ka.19) on 5.2.1992 at police station Kotwali, Haridwar and entry to that effect was made in the G.D. No.45. Ultimately, on 5.2.1992 Deepak Kumar Gupta – owner of the taxi lodged a chick report (Ex.ka.8) and the case crime No. 54/1992 was registered under section 364/406. The investigation was entrusted to D.N. Shukla (PW-7) who started the investigation and prepared the site plan of the shop of 'Sachin Travels' which is Ex.ka.6. He recorded the statement of the witnesses.

3. Meanwhile, on 01.02.1995 S.I. Makhan Singh, P.S. Babri, District Muzaffarnagar received the information about the unknown dead body lying in the forest of Roni village, Harjitpur and the entry to that effect was made in the G.D. No. 12 on 1.2.1995. The police party of police station, Babri reached at the spot and prepared the panchayatnama of the deceased (Ex.ka.12) and took the photograph of the dead body (material Ex.7). The police also prepared the challan lash, khaka lash and finger print report which are Ex.ka.13 to ka. 17. One 'Jarkin' alongwith sweater and a pair of shoes (Lakhani brand) were taken into possession by the police under the recovery memo Ex.ka.4. The clothes and shoes were collected from the dead body (material Ex. 1 to 6) out of which material Ex. 1 to 4 were not sealed so that it may be used to identify the dead body. Thereafter, the police party returned to P.S. Babri and registered a case under section 302 IPC and the investigation was taken by S.H.O. Jitendra Giri.

4. During the investigation, D.N. Shukla – I.O. (PW7) came to know on 15.2.1992 that a dead body had been recovered at P.S. Babri, Muzaffarnagar and a case had been registered under section 302 IPC. Balbir Singh Negi, Bahadur Singh and Deepak Kumar Gupta identified the clothes and photograph of the deceased-Vikram Singh. Thereafter, the

case crime no. 54/1992 was converted under section 364, 302, 394 IPC. On 20.2.1992 D.N. Shukla (PW7) arrested the appellant-Kush Kumar who was wearing the uniform of Vikram Singh (deceased) and also recovered the said taxi at Chandighat Bridge, Haridwar and the vehicle was taken into possession under the recovery memo Ex.ka.3. At the time of arrest, the uniform of Vikram Singh-deceased wearing by the appellant was also taken into possession by the police under the recovery memo Ex.ka.2 and the uniform was said to have been stitched from Skylark Tailors. After the investigation, the chargesheet was submitted against the appellant.

5. The charges were framed under sections 364, 302, 394 IPC against the appellant-Kush Kumar. The appellant denied the charges and claimed the trial.

6. In order to prove its case, the prosecution examined ten witnesses. Deepak Gupta (PW-1) was the owner of the taxi and he lodged the FIR Ex.ka.8. The taxi was recovered in his presence on 20.2.1992. He was declared hostile and did not support the prosecution case on the point that the taxi was recovered from the possession of the appellant. Ratan Singh (PW-2) and Jameel Ahmad (PW-3) proved the factum of arrest of appellant-Kush Kumar and recovery of said taxi from the possession of the appellant. They further proved the factum of recovery of the uniform of the deceased from the possession of the appellant. Jagdish (PW-4) stated that the dead body of unknown person was found in Roni village, Harjitpur, P.S. Babri, District Muzaffarnagar on 1.2.1992. Balbeer Singh (PW-5) had stated that he had seen the appellant-Kush Kumar plying the alleged taxi on 30.1.1992 and Vikram Singh-deceased was sitting at the back seat of the taxi in the Roorkee – Haridwar road. He also identified the photos and clothes of the deceased at the P.S. Muzaffar Nagar. Bahadur Singh (PW-6) has identified the photos and clothes of the deceased at the police station Muzafar Nagar. D.N. Shukla (PW-7) was the investigating officer of the case. Malkan Singh (PW-8) S.I., P.S. Babri, District Muzaffarnagar received information of unknown dead body lying in the forest of Roni village, Harjitpur and entry was made to

this effect in the G.D. No.12 on 1.2.1992. He prepared challan lash, khaka lash and finger print report which are Ex.ka.13 to ka.17.

7. Dr. N.C. Tyagi (PW-9) conducted the postmortem of the dead body of the deceased on 2.2.1992 and found the following ante-mortem injuries on the dead body of the deceased.

(i) Incised wound 6cm x 5cm into muscle deep esophagus, cut on the right side.

(ii) Incised wound 2cm x 1.5cm into hyoid bone deep, hyoid bone is cut and broken also cut on the front of neck middle.

(iii) Incised wound 4cm x 1cm into muscle deep on the left side neck upper part.

8. In the opinion of the medical officer, the death was caused due to the shock and haemorrhage resulting from ante-mortem injuries. He also proved the postmortem report (Ex.ka.18).

9. Sandeep Sharma (PW-10) was the agent of ‘Sachin Travels’. He stated that two persons came at ‘Sachin Travels’ and hired the taxi for two days to Meerut. Out of these two persons one introduced himself as Rakesh Kumar and other did not disclose his name. They further asked to send the taxi at Rishikul Gate at 2PM. Sandeep Sharma (PW-10) alongwith the taxi driver-Vikram Singh reached Rishikul Gate. On inquiry being made about them Ashok Rana student of Vth class and others told them that they were known to them. Then both the persons took the taxi and left to Meerut. When the taxi alongwith driver did not return from Meerut Sandeep Sharma (PW-10) lodged the gumsudgi report (Ex.ka.19) on 5.2.1992 at P.S. Kotwali, Haridwar.

10. The learned Ist Additional Sessions Judge on his appreciation of the evidence on record held that the prosecution had proved its case under sections 364, 394, 302 IPC against the appellant-Kush Kumar beyond reasonable doubt and sentenced him to undergo RI for life imprisonment in each count. The Ist Additional Sessions Judge further held that the prosecution could not prove its case against the caused Sunil Kumar alias

Bhura under section 364, 394, 302 IPC and he was acquitted of the charges leveled against him.

11. We have heard Sri Arvind Vashisht learned counsel for the appellant and Sri A. Rab learned Addl. G.A. We have also gone through the evidence and material on record.

12. At the outset, it need to be mentioned here that it is not disputed that the deceased-Vikram Singh met a homicidal death on account of injuries sustained by him on the date of occurrence. Medical Officer (PW-9) had also deposed that he conducted the postmortem of dead body of the deceased and also found that the death was caused due to shock and haemorrhage resulting from the ante-mortem injures on 31.2.1992 either at about 3AM in the morning or thereafter.

13. Now, we have to consider whether the appellant was responsible for the injuries sustained by the deceased. There was no eye witness of the occurrence. It need to be mentioned here that the prosecution case rests upon the circumstantial evidence. The law which is fairly settled about circumstantial evidence is that it would be such as to point out only to the guilt of the accused and the evidence should exclude all other hypothesis except the guilt of the accused. It is often said that though witnesses may lie, circumstances will not but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. In order to sustain conviction on circumstantial evidence, each of the incriminating piece of circumstantial evidence should be proved by cogent and reliable evidence and the court should be satisfied that the piece of evidence taken together forge such a chain wherefrom no interference other than the guilt can be drawn.

14. Keeping in view the above principle of law, we shall consider the circumstances projected by the prosecution against the appellant. The first circumstance relied upon the evidence of Balbir Singh (PW-5) who stated that the deceased-Vikram Singh was lastly seen alive in the company of the appellant on the Roorkee-Haridwar road and the

deceased-Vikram Singh was sitting on the back seat of the taxi at that time. He further stated that while Balbir Singh (PW-5) was plying his taxi at about 3-4PM on 30.1.1992 he saw a taxi coming from Haridwar side which was being driven by the appellant and the deceased-Vikram Singh was sitting on the back seat of the taxi. It is not the prosecution case that both the cars stopped there and deceased-Vikram Singh and Balbir Singh (PW-5) had some conversation. Contrary to it, it is the evidence of the prosecution that both the cars were running on the opposite directions. During the cross-examination, he had stated that he did not know the appellant earlier to said occasion. It is highly improbable that Balbir Singh (PW-5) would identify the appellant-Kush Kumar who is not known to him earlier while he was plying his taxi on the road. Thus, the evidence of Balbir Singh (PW-5) is highly improbable and his evidence does not inspire confidence.

15. The prosecution has also adduced the evidence of **Sandeep Sharma-PW10** {the agent of 'Sachin Travels'} who was sitting in the office of 'Sachin Travels' at the time of hiring the taxi by the appellant. He stated that two persons came at 'Sachin Travels' and hired the taxi for two days to be taken to Meerut. One introduced himself as Rakesh Kumar and other did not disclose his name. They further instructed him to send the taxi at Rishikul Gate at 2PM. Sandeep Sharma (PW-10) alongwith the taxi driver-Vikram Singh reached Rishikul Gate. On inquiry being made about them Ashok Rana – student of Vth class and others told them that they were known to them. Then both the person took the taxi and left for Meerut. When the driver alongwith the taxi did not return from Meerut, Sandeep Sharma (PW-10) lodged the gumsudgi report (Ex.ka.19) on 5.2.1992 at P.S. Kotwali, Haridwar. He stated during his cross examination that the person, who introduced himself as Rakesh Kumar at 'Sachin Travels' on 30.1.1992, was actually Kush Kumar-appellant and thus claimed that the appellant (then present in the dock) he identified in the court that the appellant is the same person who introduced himself as Rakesh Kumar on 30.1.1992. However, the appellant was not named in the FIR. D.N.Shukla (PW-7)-I.O. had stated during the cross examination that the accused Sunil @ Bhura was not named in the FIR. During the investigation, he found that the accused

Sunil @ Bhura did not disclose his correct name at the ‘Sachin Travels’ but introduced himself by the fake name of Rakesh Kumar. As such the prosecution evidence is self-contradictory and did not inspire confidence.

16. Now, we have to consider as to whether the evidence of recovery of the alleged taxi from the possession of the appellant is credible and cogent. The prosecution produced the evidence of Deepak Kumar Gupta (PW-1), Ratan Singh (PW-2), Jameel (PW-3) and D.N. Shukla (PW-7) to prove the factum of recovery and the arrest of the accused. All the prosecution witnesses had stated that they proceeded alongwith the police party from Haridwar to Nazibabad in search of the alleged taxi and reached there in the same day. When they could not find out the said taxi at Nazibabad they left Nazibabad and reached Laldang where they made a thorough search of the said taxi but they failed there also to find out the said taxi. While they were returning to Haridwar they saw an ambassador car parked at the Chandighat bridge, the bonnet of which was open and the appellant was doing some repair work in the engine. It was found that it was the same taxi which was hired from the ‘Sachin Travels’ on 30.01.1992. D.N. Shukla (PW-7) tallied the engine and chasis numbers and found that this ambassador car was the taxi which was hired from the ‘Sachin Travels’ on 30.1.1992. Then the said taxi was taken into possession and the appellant was also arrested at about 9-9:30PM.

17. The learned counsel for the defence submitted that the evidence of recovery is unreliable and the taxi was never recovered from the possession of the appellant. He further submitted that Ratan Singh (PW-2) states that the taxi was recovered during the day light meaning thereby the recovery was made before the sun set. Whereas Jameel (PW-3), D.N. Shukla (PW-7) states that the taxi was recovered at about 9:30 PM and recovery memo was prepared in the light of the torch. It was further submitted that the appellant was found wearing light brown coloured uniform of the deceased at the time of arrest. Witness Bahadur Singh (PW-6) is also a taxi driver and he plies the taxi from the same taxi stand, Haridwar. He stated in his cross examination that the uniform of the taxi driver of his taxi stand is of grey colour. It was further submitted by the defence that the recovered uniform was not produced before the court.

There is contradiction as to how Ratan Singh (PW-2), Jameel Ahmad (PW-3) and D.N. Shukla (PW-7) identified the taxi at the spot. It was further submitted that how the I.O. tallied the engine and chasis numbers while he had no papers of the missing taxi. It was thus rightly submitted by the defence that the evidence was not cogent and credible.

18. Deepak Kumar Gupta (PW-1) has stated in his evidence that he went to Nazibabad in search of the taxi No. 7987. When the taxi could not be found at Nazibabad and Laldang after a thorough search he along with Ratan Singh (PW2), Jameel Ahmad (PW-3), D.N. Shukla (PW-7) and the police party was returning to Haridwar they saw a taxi standing at the Chandighat bridge and the vehicle was identified as taxi No. 7987. The said taxi was taken into possession by the police on 20.02.1992. But he denied that the taxi was recovered from the possession of the appellant although he admitted his signature on the recovery memo. Therefore, he was declared hostile by the prosecution. In fact he did not support the prosecution case that the police recovered the said taxi from the possession of the appellant.

19. The prosecution has also adduced the evidence of Ratan Singh (PW-2) who stated that while he alongwith the police party was returning to Haridwar and when they reached near the Chandighat bridge they saw a taxi standing at the Chandighat bridge on its western end. The alleged taxi was recovered during the evening. Meaning thereby, the taxi was recovered before sun set. Ratan Singh (PW-2) has also stated in his evidence that they stopped the car and stepped out from it and inquired from the person who was repairing the defects. Meanwhile, he noticed that 7987 number was written on the screen of that vehicle (taxi). Then he made a call that it was the same taxi which had been stolen. The police tallied the engine and chasis numbers of the taxi and the said vehicle. The registration number of the taxi was written by the coal and there were no number plates on it. He further stated that the appellant was found wearing light brown uniform prescribed by the management of taxi union. The said uniform was seized from the appellant. The witness further stated that the said uniform belonged to the deceased-Vikram Singh.

20. The prosecution has adduced the evidence of Jameel (PW-3) who had stated that the police party came to the taxi stand at about 5PM in the evening of 20.2.1992 and they took the vehicles from the Haridwar taxi stand to proceed to Nazibabad in search of the missing taxi. They reached at Nazibabad and made a search but the taxi could not be traced out. Then, they went to Laldang but the taxi could not be traced out there also. While he, alongwith the police party and other prosecution witnesses was returning to Haridwar they saw an ambassador car parked at the Chandighat bridge at about 9:30PM. Then they stopped their vehicle. Jameel (PW-3) stated that as soon as they stepped out from their vehicle Ratan Singh (PW-2) identified the said ambassador as the taxi no. 7987 which had been stolen. It was found that there was no number plate on the taxi. Jameel (PW-3) has further stated that D.N. Shukla (PW-7) who was the I.O. of the case immediately tallied the engine and chasis number of the taxi and disclosed that it was the same taxi which was hired from 'Sachin Travels'. Then the taxi was taken into possession by the police under the recovery memo, Ex.ka.1, and the appellant was also arrested at that time. The recovery memo was prepared in the light of the torch.

21. The prosecution has adduced the evidence of D.N. Shukla (PW-7) who stated that when they were returning to Haridwar they saw an ambassador car parked on the western end of the Chandighat bridge and the bonnet of which was open and the appellant was doing some repair work in the engine. When Deepak Kumar Gupta (PW-1) and Ratan Singh (PW-2) saw the vehicle at a distance they identified it as the taxi which was missing. They reached near the taxi and asked the name of the person who was repairing the taxi. Then the said taxi was taken into possession and the appellant was arrested at about 9-9:30PM. D.N.Shukla (PW-7) tallied the engine and chasis numbers and found that the said vehicle (taxi) was the same taxi which was hired from the 'Sachin Travels'. He further stated that the appellant was found wearing light brown pant and bu-shirt stitched by Skylark Tailors. He took the light brown colour uniform into his possession from the appellant under the recovery memo Ex.ka.2. He further stated in his cross examination that he did not know the engine and chasis numbers of the alleged taxi till 20.2.1992 and he had not seen the registration papers of the said taxi till

the date of recovery i.e. 20.2.1992. He further tried to explain that the engine and chasis numbers were made available to him by the taxi union and he noted those numbers in his diary. He admitted in his cross examination that he did not incorporate in the case diary that the engine and chasis numbers were made available to him by the taxi union. He further stated that he never obtained the copy of the registration and permit of the said taxi from the R.T.O. He further tried to explain that the said numbers were made available to him on 20.2.1992 by Deepak Kumar Gupta (PW-1). However, Deepak Kumar Gupta (PW-1) or any other witnesses have not stated that the papers of the said taxi were supplied to D.N.Shukla (PW-7). He further admitted that the uniform which was recovered from the possession of appellant at the time of arrest was not produced before the court at the time of the evidence. The recovery memo was prepared in the light of the torch.

22. The evidence of Ratan Singh (PW-2), Jameel Ahmad (PW-3) and D.N.Shukla (PW-7) is not credible and cogent with regard to the factum of recovery and arrest of the appellant. The appellant was not named in the FIR. There were glaring discrepancies in the statements of the prosecution witnesses with regard to the recovery of the taxi. The above deposition clearly reveal that D.N.Shukla (PW-7) had no registration or other papers with regard to the taxi at the time of the recovery. Bahadur Singh (PW-6) has stated in cross examination that the uniform of the taxi driver was of grey colour whereas D.N.Shukla (PW-7) stated that the appellant was found wearing light brown pant and bu-shirt tailored by the Skylark Tailors and it was further stated that the said uniform belonged to the deceased-Vikram Singh. The deceased-Vikram Singh was found wearing the said uniform on 30.1.1992 when he took the taxi to Meerut. The said uniform was taken into possession from the appellant by D.N.Shukla (PW-7) under the recovery memo Ex.ka.2. According to D.N.Shukla (PW-7) the said uniform was not produced before the court at the time of his evidence. Balbeer Singh (PW-5) had stated that the uniform of the drivers prescribed by management of the taxi union was of grey colour and he also stated in his evidence that the deceased-Vikram Singh were lastly seen alive in company of the appellant in grey coloured dress. Deepak Kumar Gupta (PW-1) and Ratan Singh (PW-2) stated that

the recovery was made in the day-light and the recovery memo was prepared in the day-light whereas the Jameel Ahmad (PW-3) and D.N.Shukla (PW-7) stated that the recovery was made at about 9:30PM and the recovery memo was prepared in the light of the torch. Ratan Singh (PW-2) at one stage stated that the said taxi was recovered from the western end of the Chandighat bridge and on the other occasion stated that it was recovered from the eastern end of the Chandighat bridge. This apart, D.N.Shukla (PW-7)-I.O. has not prepared the site plan from where the taxi was recovered from the possession of the appellant.

23. In view of the foregoing discussion, we are of the view that the evidence of the recovery and arrest of the appellant also does not inspire confidence and the appellant could not be saddled with the liability of committing the crime. Therefore, the appellant deserve to be acquitted of the charges leveled against him.

24. For the reasons aforesaid this appeal succeed and is hereby allowed. The judgment and order dated 8.9.1995 passed by the Ist Addl. Sessions Judge is set aside. The appellant is on bail. He need not surrender. His bail bonds are cancelled and sureties are discharged.

25. Let the record be sent back to the court concerned for compliance, if any and report be submitted within two months.

(J.C.S. Rawat. J.) **(Irshad Hussain, J.)**

Dated : 01 Sept. 2004

LSR